United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

77-7237

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-7237

BRITISH AIRWAYS BOARD AND COMPAGNIE
NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

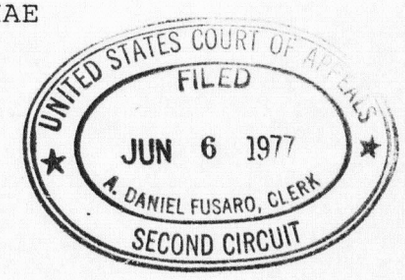
-against-

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF THE GOVERNMENTS OF THE UNITED KINGDOM AND FRANCE, AMICI CURIAE



HENRY L. DIAMOND
Beveridge, Fairbanks & Diamond
One Farragut Square
Washington, D.C. 20006
(202) 638-7800

Attorney for the Government of
the United Kingdom

CHARLES E. GOODELL
Hydeman, Mason & Goodell
1220-19th Street, N.W.
Washington, D.C. 20036
(202) 833-9040

Attorney for the Government
of France

TABLE OF CONTENTS

	Page
INTRODUCTION: The Bilateral Agreements and the February 4, 1976 Order of Secretary Coleman	3
1. Regardless Of The Status Of The Port Authority's Resolution Under The Bilateral Agreements, Only The United States As "Contracting Party" Could Withhold Or Revoke The Airlines' Rights Under The Agreements For Violation Of That Resolution. No Violation Has Occurred And The United States Has Not Done So.	6
2. The Port Authority's Resolution Of March 11, 1976, Purporting To Ban Concorde Cannot Reasonably Be Construed As A "Law" Or "Regulation" Within The Meaning Of Articles 5 and 6 Of The Bilateral Agreements.	8
3. If The Bilateral Agreements Permit The Contracting Parties To Conduct Demonstrations Such As Secretary Coleman Ordered In The Case of Concorde, It Is Clear That They Alone Have That Authority And Others Such As The Port Authority May Not Interfere With Or Prevent Such Demonstrations.	11
CONCLUSION	13
Certification for the Government of the United Kingdom	15
Certification for the Government of France	16

TABLE OF AUTHORITIES

Bermuda Agreement of 1946 between the Government of the United States and the Government of the United Kingdom:	
Article 1	3
Article 2	3,5
Article 5	6,7,8,9
Article 6	6,7,8,11,12
Article 12	3
Annex	3
Department of Transportation Act, 80 Stat. 931, 49 U.S.C. §1651-59	4
Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. §301 et seq.	4

TABLE OF AUTHORITIES (CONTINUED)

	Page
Paris Agreement of 1946 between the Government of the United States and the Government of France:	
Article I	3
Article II	3,5
Article V	6,7,8,9
Article VI	6,7,8,11,12
Article IX	3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-7237

BRITISH AIRWAYS BOARD AND COMPAGNIE
NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF THE GOVERNMENTS OF THE UNITED KINGDOM AND FRANCE, AMICI CURIAE

The issue before this Court is whether the Order, Judgment, and Decree of District Judge Milton Pollack declaring unlawful the actions of the Port Authority of New York and New Jersey in delaying operations of Concorde aircraft into John F. Kennedy Airport should be upheld. This is a matter of great concern to the Governments of the United Kingdom and France ("the Governments"). The Concorde represents a major commitment of national resources and will by both

countries. Its success represents a major achievement not only in transport technology, but in international cooperation. The Governments have found the delays by the Port Authority in carrying out the demonstration ordered by Secretary Coleman disappointing and frustrating. While refraining from commenting on the purely domestic law issues involved in this case, they have already stated to the District Court their view that these delays amounted to a serious violation of the spirit and of some specific requirements of the bilateral agreements regarding air services which they have with the United States.

Chief Judge Kaufman's request to the United States Department of State of May 25, 1977 raises issues of international law that are of vital importance to the Governments. Judge Kaufman asked the Department of State:

> "Does the Port Authority resolution of March 11, 1976 denying appellees permission to operate the Concorde into or out of John F. Kennedy Airport, offend any relevant international treaties or agreements?"

As parties to the "treaties or agreements" to which Judge Kaufman's question refers, the Governments respectfully submit that their views as to the meaning and interpretation of the rights and duties created therein are entitled to be given substantial weight. This Brief sets forth the views of the Governments as to the meaning of the agreements so far as is relevant to this appeal. It is their position that the Port Authority's action does indeed offend these agreements.

INTRODUCTION: The Bilateral Agreements And The February 4, 1976 Order Of Secretary Coleman.

The Bermuda Agreement (Article 1, 2 and Annex Parts I and III) and the Paris Agreement (Articles I, II and Annex Sections I and II and Table I) impose obligations on the United States to allow the operation by British Airways and Air France ("the Airlines"), as designated carriers, of certain agreed commercial services. The Bermuda Agreement (Article 2) specifically provides that:

> "(1) The agreed services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights are granted, but not before (a) the Contracting Party to whom the rights have been granted has designated an air carrier or carriers for the specified route or routes, and (b) the Contracting Party granting the rights has given the appropriate operating permission to the air carrier or carriers concerned (which, subject to the provisions of paragraph (2) of this Article and of Article 6, it shall do without undue delay).
>
> "(2) The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfil the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers."

The wording of Article II of the Paris Agreement is virtually the same.

Under Article 12(a) of the Bermuda Agreement and Article IX(b) of the Paris Agreement, the "aeronautical authorities" who are to be satisfied under the above provisions are, in the case of the U.S.A., the Civil Aeronautics Board ("CAB") and any person or body authorized to perform any functions formerly exercised by the

Board or similar functions. Since the date of the respective agreements, the functions of the Civil Aeronautics Board, as described, have been by statute vested in the CAB, in the Department of Transportation, or in the Federal Aviation Administration. See Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. §301, et seq., Department of Transportation Act, 80 Stat. 931, as amended, 49 U.S.C. §1651-59. No provisions of the Acts cited purport to grant to local agencies or entities the functions of the CAB with regard to international traffic. The Contracting Parties to the bilateral agreements clearly did not contemplate the Commissioners of the Port Authority as "aeronautical authorities."

In the instant case, the Airlines have satisfied all the conditions which may be imposed by the respective bilateral agreements:

(1) British Airways and Air France have been designated by the British and the French Governments to operate certain agreed commercial services which include London to New York and Paris to New York.

(2) These designations have been accepted by the U. S. Government.

(3) The Civil Aeronautics Board has concluded that the carriers are "fit, willing and able" to perform their functions within the meaning of Section 402(b) of the Federal Aviation Act, 49 U.S.C. §1372(b).

Therefore, British Airways has been granted a foreign air carrier permit by the CAB authorizing air service on the London-New York route by CAB Order 74-4-17, approved by the President on April 2, 1974. Air France has been granted a foreign air carrier

permit authorizing service on the Paris-New York route by CAB Order 69-12-58, approved by the President on December 11, 1969. The CAB has declined to amend the permits of either carrier to restrict operations thereunder with regard to the Concorde.

(4) The Secretary of Transportation has concluded that Concorde will comply with or has complied with all the rules and regulations regarding entry into, departure from, and operation within the airspace of the United States. Therefore, both carriers have been authorized by the Department of Transportation and the Federal [illegible]ion Administration to conduct services to John F. Kennedy Airport using Concorde, in accordance with amendments to their operations specifications issued on April 2, 1976, pursuant to the Order issued by Secretary of Transportation Coleman on February 4, 1976, after a most thorough and comprehensive review.

In the view of the Governments, these findings by Secretary Coleman affirmatively establish the necessary compliance with all relevant provisions of the two Agreements and thus entitle the designated airlines to operate Concorde aircraft immediately on the agreed services of London-New York and Paris-New York. Article 2 says that "The agreed services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights are granted." The claim that the Port Authority could nonetheless interpose its ban and thereby prevent or delay such service is, for the reasons discussed in the balance of this Brief, not a claim which has any valid basis in the agreements.

1. Regardless Of The Status Of The Port Authority's Resolution Under The Bilateral Agreements, Only The United States As "Contracting Party" Could Withhold Or Revoke The Airlines' Rights Under The Agreements For Violation Of That Resolution. No Violation Has Occurred And The United States Has Not Done So.

Under Article 5 and 6 of the Bermuda and Paris Agreements, the United States as "Contracting Party" may in some circumstances withhold or revoke the rights of the Airlines to provide "agreed services" for failure to comply with its "laws and regulations" governing the entry, departure, and operation of aircraft in international navigation with respect to U. S. territory. Those rights are expressly reserved under Article 6 of both agreements to "(e)ach Contracting Party." On the United States side, the relevant Contracting Party is "The Government of the United States of America." No other provisions of the agreements give to any other entity the power to revoke or withhold the route rights of designated airlines. A separate right to withhold or limit route rights can only be implied in Article 5 of the agreements by reading that Article as though Article 6 did not exist. But it is obvious that these two Articles must be read together to form a consistent whole. When Articles 5 and 6 are read together, it is clear that in the event of failure by a carrier to comply with domestic laws or regulations only a Contracting Party may revoke or limit its route rights. Moreover revocation or withholding may be imposed only after the occurrence of a violation and not in anticipation of one.

The power to revoke rights granted and duly vested under international agreement belongs to the national Contracting Parties who made that agreement and look to one another for its performance. It was certainly never contemplated by either the British or French Governments that local authorities would arrogate to themselves the power to limit landing rights -- and that before any violation of a law or regulation has been committed by the airlines -- as though they were themselves Contracting Parties to the agreements. Route rights are traded in international negotiations between states all over the world, and it is standard that only the national governments of those states can withhold or revoke the rights granted by the agreements. The Federal Government of the United States has, after the most careful consideration of all the issues, made a specific decision to admit Concorde to New York for a 16-month trial period.

It is, therefore, not necessary for this Court to decide whether the Resolutions of the Port Authority now under challenge come within those "laws and regulations" referred to in Article 5 of the bilateral agreements which the Contracting Parties may invoke by virtue of Article 6 of those agreements. The fundamental question is not which laws apply, but <u>who</u> may apply them, and when, within the framework of the agreements. Unilateral action by non-national authorities such as the Port Authority undermines the agreements and the mutual undertakings between national governments which they contain.

At no time during its negotiation of the 1946 bilateral agreements with the United Kingdom and France did the United States reserve the possibility that its commitments to those Governments in the performance of the agreements could be nullified or impaired by unilateral action of the Port Authority or another non-federal authority. There cannot be reciprocity, which is the basic principle of the agreements, if the British and French commitments under the agreements are complete and effective without qualification when given, while the United States commitments are to be regarded as subject to impairment or nullification by separate entities such as the Port Authority.

2. The Port Authority's Resolution Of March 11, 1976, Purporting To Ban Concorde Cannot Reasonably Be Construed As A "Law" Or "Regulation" Within The Meaning Of Articles 5 And 6 Of The Bilateral Agreements.

The terms "law" and "regulation" denote instruments laying down norms of general application. The Port Authority's Resolution of March 11, 1976 banning Concorde from JFK Airport does not have this legislative character. It was directed at a particular aircraft, the Concorde, and does not purport to be more than a temporary ban. It lays down no norms or standards; it simply prohibits Concorde. It is not on its face a "law" or "regulation," but an order.

Judge Pollack reached the same conclusion when, during oral argument of this case before him on April 28, 1977, he characterized the Port Authority's Resolution as a mere "contradiction" of Secretary Coleman's order, not a regulation. (See page 82 of

the transcript of that argument.) Moreover, Mr. Falvey, counsel for the Port Authority, during the same argument, admitted openly and directly that the March 11 Resolution was indeed not a regulation:

"Mr. Falvey: ...We adopted a temporary ban.

"The Court: Did you adopt any regulations?

"Mr. Falvey: No, sir."

(Transcript, page 81)

It certainly was not within the contemplation of the Contracting Parties to the Bermuda and Paris Agreements that ad hoc and overtly discriminatory executive orders and fiats, having none of the generality of true laws and regulations, should become the basis for withholding or revocation of operating rights under those Agreements. What was agreed by the Contracting Parties was that their designated air carriers would be subject to United States laws and regulations of general force and effect as to international air service. But to allow the interposition of particularized local orders, such as the Port Authority's March 11, 1976 Resolution, seriously undermines the stability of those agreements and the predictability and fairness of the requirements which each Contracting Party may impose upon the other.

Quite apart from the issue of whether the Port Authority Resolution is a "law" or "regulation" at all, it is disqualified on two grounds of international law from being regarded as a law or regulation within the contemplation of Article 5 of the agreements -- it appears on its face to be discriminatory and it undermines the rights granted under the international agreements.

References in international agreements of widely differing kinds to domestic "laws and regulations" of a contracting state are invariably interpreted as being subject to three limitations: Firstly, they must be applied in good faith; secondly, they must be non-discriminatory and they must be applied in a non-discriminatory manner; and thirdly, they must not be of such a character that they nullify or undermine the rights granted under international agreement. The Port Authority Resolution may be attacked on two grounds -- it is overtly discriminatory in that it applies specifically to a particular operation by particular carriers and was a ban imposed in advance of any violation of any normative legal rule, and it seriously undermines the route rights granted to the designated airlines by international agreements. International law has never permitted a reference to domestic laws and regulations to be interpreted in such a way as to cut across the fundamental rights conferred by the international agreement in question.

This position was supported by the State Department, who in written testimony which they submitted to Secretary Coleman said, "We do not interpret the applicable international agreements as prohibiting non-discriminatory regulation for a valid public purpose (assuming of course that such regulation does not substantially impair the value of route rights conferred by the bilateral agreements)."

3. If The Bilateral Agreements Permit The Contracting Parties To Conduct Demonstrations Such As Secretary Coleman Ordered In The Case Of Concorde, It Is Clear That They Alone Have That Authority And Others Such As The Port Authority May Not Interfere With Or Prevent Such Demonstrations.

Judge Pollack's decision rests squarely on the preemptive authority of the federal government under domestic law to order a 16-month trial of Concorde, and he viewed the Bermuda and Paris Agreements as "not applicable to experimental tests which are the only subject matter ruled on by the Secretary and banned by the [Port Authority]." (District Court Decision, page 31.) However, it is clear from his February 4, 1976 decision that Secretary Coleman relied as well on the bilateral agreements as giving him the power to order a demonstration of Concorde before approving a permanent amendment to the operating specifications of British Airways and Air France. Secretary Coleman concluded at the end of his discussion of the international law framework for his decision that "The Concorde is sufficiently different from subsonic jet aircraft in its environmental characteristics that admission on a trial basis and the imposition of different operating requirements are amply justified." (Page 12 of his February 4, 1976 decision.)

Article 6 of the Bermuda Agreement reserves to "[e]ach Contracting Party" the power to withhold operating rights from a designated carrier of the other party in case of failure by that carrier to comply with the laws and regulations referred to in Article 5. Article VI of the Paris Agreement is virtually identical. It may be argued on the basis of this Article that in the case of a new type of aircraft not yet fully tested in commercial service, a

Contracting Party may withhold permanent operating rights and order commercial service on a trial basis with the object of testing whether the operations of the carriers with the new aircraft do in fact conform to all applicable domestic laws and regulations.

What is clear, however, and is most relevant to this appeal, is the point that if Article 6 does in an appropriate case confer testing power, that power is reserved exclusively to "[e]ach Contracting Party," that is, to each of the signatory national governments. Conversely, it is not within the power of a non-federal agency such as the Port Authority to interfere with or nullify such a demonstration, thereby frustrating its very purpose and preventing the designated air carrier from demonstrating its ability to comply fully with U.S. laws and regulations. As has been pointed out above, the scheme of the bilateral agreements is a series of reciprocal undertakings between national governments and it is those governments alone which can limit, withhold, or revoke the rights of designated air carriers under the Agreements.

Assuming, therefore, that Article 6 implies a testing authority, it is an authority which only the Contracting Party itself can exercise and for that reason as well the Port Authority's ban of the Concorde test which Secretary Coleman ordered is an interference with the exercise of exclusive federal power and cannot be sustained under the bilateral agreements.

CONCLUSION

The foreign relations consequences of the Port Authority's attempted nullification of Secretary Coleman's decision should also be considered. The Governments have repeatedly made known to the Government of the United States the importance they attach to the earliest possible commencement of Concorde services to New York. The matter has been the subject of repeated representations to the United States Government at the highest level. In light of the Governments' views above as to the effect of the present case on their treaty rights, they would view the continued denial of these rights as a matter having serious political implications and likely to affect their relations with the United States.

Concorde has been a major national effort of both Governments for over a decade. It was designed primarily for the New York-London and New York-Paris routes and can only achieve its full economic potential if it is permitted to fly those routes. Indeed, if it is not allowed to compete on those routes, it will be extremely difficult for the aircraft to prove itself commercially and as a result the Concorde project will be seriously jeopardized.

The airlines and their Governments have scrupulously observed their obligations under the bilateral agreements between those Governments and the United States. They have fully complied with all relevant regulations. Although they have believed that they are entitled to inaugurate regular Concorde service now on a permanent basis, they have accepted, nonetheless, Secretary Coleman's decision that initially a 16-month demonstration should be conducted.

They are entitled to expect that their rights to conduct such a demonstration within the framework of that decision and of the bilateral agreements will be fully honored. The Port Authority's attempted nullification of that decision and interference with those rights does indeed offend the agreements. The Governments, therefore, urge that this Court affirm Judge Pollack's decision enjoining the Port Authority from interference with the demonstration that Secretary Coleman ordered.

Respectfully submitted,

Henry L. Diamond

HENRY L. DIAMOND
Beveridge, Fairbanks & Diamond
One Farragut Square South
Washington, D.C. 20006
Telephone: (202) 638-7800

Attorney for the Government
of the United Kingdom

Charles E. Goodell

CHARLES E. GOODELL
Hydeman, Mason & Goodell
1220-19th Street, N.W.
Washington, D.C. 20036
Telephone: (202) 833-9040

Attorney for the Government
of France

I hereby certify that the foregoing statement accurately and truly states the position of Government of the United Kingdom on the matters set forth therein, and that I am authorized by my Government so to certify.

Peter Ramsbotham

Sir Peter Ramsbotham
Ambassador Extraordinary
and Plénipotentiary

I hereby certify that the foregoing statement accurately and truly states the position of Government of France on the matters set forth therein, and that I am authorized by my Government so to certify.

Jacques Kosciusko-Morizet
Ambassador Extraordinary
and Plenipotentiary

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-7237

BRITISH AIRWAYS BOARD AND COMPAGNIE
NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, et al.,

Defendants-Appellants.

CERTIFICATE OF SERVICE

I certify that copies of the Brief of the Governments of the United Kingdom and France, Amici Curiae were delivered on June 6, 1977 to the offices of counsel of record for each of the parties and other amici curiae in this appeal.

Charles E. Goodell

Charles E. Goodell
Hydeman, Mason & Goodell
1220-19th Street, N.W.
Washington, D.C. 20036
(202) 833-9040

Attorney for the Government
of France

BEST COPY AVAILABLE